SUPREME COURT, U. S.
FILED
SEP 20 1979
MICHAEL RODAK, JR., CLERK

No. 79-180

In the Supreme Court of the United States

OCTOBER TERM, 1978

PATRICK T. SHEEDY, PERSONAL REPRESENTATIVE FOR THE ESTATE OF CECELIA BINN, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-180

PATRICK T. SHEEDY, PERSONAL REPRESENTATIVE FOR THE ESTATE OF CECELIA BINN, DECREASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the decision below holding that the district court properly dismissed his suit for refund of federal estate taxes for lack of jurisdiction on the ground that no timely claim for refund had been filed.

The pertinent facts are as follows: Cecelia Binn died on April 1, 1967, and Oscar Binn was appointed as personal representative for her estate. On November 19, 1969, he filed an estate tax return which showed a tax due of $32,430.05. No payment, however, was made with the return. Subsequently, Oscar Binn was removed as personal representative because of his failure to properly administer and close the estate. On October 3, 1973, petitioner was appointed as the successor personal

representative. He inquired of the Internal Revenue Service as to whether an estate tax return had been filed and was erroneously informed that no return had been filed. The Service also advised petitioner that a tax was due. On April 18, 1974, petitioner thereafter filed another estate tax return reporting a liability of $27,017.50. The full amount of the reported tax, plus $9,788.25 in interest, was paid on or about July 30, 1974 (Pet. App. 1-2; R. 2-5).[1]

On November 11, 1976, the Internal Revenue Service advised petitioner by letter that, although the original personal representative had not paid any of the taxes due, a previous estate tax return had in fact been filed on November 19, 1969. The letter further stated that because the statutory period in which any estate tax could be assessed and collected on the first return had expired, the July 1974 payment made by petitioner could not be retained by the Service without a letter from petitioner stating that the payment was voluntary. More than two years later, on November 30, 1976, petitioner requested a refund of the amount paid. Subsequently, the Internal Revenue Service advised petitioner that no refund would be made because it had determined that a refund was not allowable because no claim for refund was filed within the applicable statute of limitations[2] (Pet. App. 1-2; R. 5-6, 11-12).

In this refund suit brought by petitioner in the United States District Court for the Eastern District of

[1]"R." refers to the record appendix filed in the court of appeals.

[2]The November 30, 1976, request was made more than two years after the estate remitted payment, and more than three years after the initial estate tax return was filed. Thus, treating petitioner's November 30, 1976 letter as a claim for refund, the claim was filed beyond the required time limitations set forth in Section 6511(a) of the Internal Revenue Code of 1954 (26 U.S.C.).

Wisconsin, the district court dismissed the action for lack of jurisdiction because of the estate's failure to file a timely claim for refund (Pet. App. 1-4). The court of appeals affirmed. It rejected petitioner's contentions that the government should be estopped from raising the bar of the statute of limitations and that equitable considerations should toll the statute of limitations (Pet. App. 5-7).

1. The court of appeals correctly held that the district court had no jurisdiction to consider petitioner's action for a refund of taxes because a timely claim for refund had not been filed.

The jurisdictional basis for suit against the United States for refund of taxes is 28 U.S.C. 1346(a)(1). Congress, however, has conditioned the government's consent to be sued in such cases upon the timely filing of an administrative claim for refund. See Section 7422(a) of the Internal Revenue Code of 1954. This provision uniformly has been interpreted as establishing a jurisdictional requirement that cannot be waived. *E.g.*, *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 273 (1931); *Ancel* v. *United States*, 398 F. 2d 456, 458 (7th Cir. 1968); *Crismon* v. *United States*, 550 F. 2d 1205 (9th Cir. 1977); *Bruno* v. *United States*, 547 F. 2d 71 (8th Cir. 1976); *Kreiger* v. *United States*, 539 F. 2d 317 (3d Cir. 1976); *Lewis* v. *Sandler*, 498 F. 2d 395, 399-440 (4th Cir. 1974); *United States* v. *Rochelle*, 363 F. 2d 225, 231 (5th Cir. 1966).

The relevant timeliness requirements in Section 6511(a) of the Code provide that the claim for refund must be filed within three years from the time the return was filed, or within two years from the time the tax was paid, whichever expires later. Here, more than two years elapsed between the payment of the tax and petitioner's

filing of a claim for refund. Thus, petitoner's claim is barred by the statute of limitations and the district court had no jurisdiction to hear the suit.[3]

2. Petitioner contends (Pet. 7-12) that the general statutory authority in 28 U.S.C. 1340 confers jurisdiction on the district court to decide cases involving the federal revenue, whether or not the plaintiff files a timely claim for refund, and that, by virtue of this grant, the district courts may exercise inherent equitable powers to hear the suit and provide relief.

But Section 1340 is merely the general grant of jurisdiction to district courts to entertain actions of a certain class, *viz.*, "any civil action arising under any Act of Congress providing for internal revenue." It is well established that in order to confer jurisdiction over the United States, Section 1340 must be read in the light of any other statutory conditions imposed by Congress for waiving the government's sovereign immunity. See, *e.g.*, *Essex* v. *Vinal*, 499 F. 2d 226, 231 (8th Cir. 1974); *Guerkink Farms, Inc.* v. *United States*, 452 F. 2d 643, 644 (7th Cir. 1971); *DeMasters* v. *Arend*, 313 F. 2d 79, 84 (9th Cir. 1963), cert. dismissed, 375 U.S. 936 (1963); First *National Bank of Emlenton, Pa.* v. *United States*, 265 F. 2d 297, 299 (3d Cir. 1959). It is therefore clear that the district court correctly held that it had no jurisdiction to hear this case in the absence of a timely claim for refund. *Essex* v. *Vinal*, *supra*.

---

[3]It is undisputed that petitioner paid the estate tax no later than July 30, 1974, and filed the informal claim for refund on November 30, 1976 (Pet. App. 6). The two-year period from the time the tax was paid is used because it results in a later expiration date, July 30, 1976, than the expiration of the three-year period from the date the initial estate tax return was filed on November 19, 1969. The district court correctly held, and petitioner did not argue otherwise, that it is only the initial return filed, and not a later filing, which is relevant for purposes of the statute. See *Goldring* v. *Commissioner*, 20 T.C. 79, 81 (1953).

Contrary to petitioner's argument (Pet. 7-12), *Porter* v. *Warner, Co.*, 328 U.S. 395 (1945), and *Mitchell* v. *DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), do not conflict with the decision below. They stand for the proposition that where Congress by statute has granted jurisdiction to a court, giving it the equitable power to enforce prohibitions contained in a regulatory enactment, implied in that grant is the power to provide complete relief in light of the statutory purpose. Subject matter jurisdiction, however, is distinct from the question of the remedies a federal court may make available. See *Davis* v. *Passman*, No. 78-5072 (June 5, 1979), slip op. 11-12 n. 18. Those cases do not support the existence of subject matter jurisdiction based on an equitable estoppel theory. There is no authority holding that a district court has subject matter jurisdiction over a tax refund suit in the absence of a timely claim for refund.

3. Petitioner also contends (Pet. 13-22) that the doctrine of equitable tolling should be applied to enlarge the period of limitations so as to render its claim to be timely. But the "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Soriano* v. *United States*, 352 U.S. 270, 276 (1957). In view of this Court's admonition in *Soriano* regarding implied exceptions to the conditions imposed by the government in giving its consent to be sued, the courts have consistently held that equitable exceptions to the jurisdictional requirements of the statute are not permitted. *Kreiger* v. *United States*, *supra*; *Crismon* v. *United States*, *supra*; *Bryan* v. *United States*, 99 F. 2d 549 (10th Cir. 1938), cert. denied, 305 U.S. 661 (1939).

This rule is as applicable to tax refund actions as to any other suit against the United States. *United States* v. *Michel*, 282 U.S. 656 (1931); *Kreiger* v. *United States*,

supra, 539 F. 2d at 321; *Kaltreider Cosntruction, Inc.* v. *United States*, 303 F. 2d 366 (3d Cir.) cert. denied, 371 U.S. 877 (1962); *Bryan* v. *United States*, *supra*, 99 F. 2d at 552. Thus, the time limitations set forth in Section 6511(a) of the Code cannot be equitably tolled, even where it is alleged the taxpayer's failure to file a timely claim for refund was a result of fraudulent concealment by the government or some third party. *Kreiger* v. *United States*, *supra*; *Bryan* v. *United States*, *supra*. Although this Court in *Bailey* v. *Glover*, 88 U.S. 342 (1874), and *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946), held that a statute of limitations was tolled as a result of fraudulent concealment, those cases did not involve suits against the sovereign and the attendant principle that the conditions attached to the sovereign's consent to be sued must be strictly construed.[4] *Kreiger* v. *United States*, *supra*, 539 F. 2d at 321.

---

[4]At all events, the facts here do not support estoppel against the government. The original personal representative filed an estate tax return but remitted no payment as he was required to do without assessment or notice and demand. Sections 6151 and 2002 of the Internal Revenue Code of 1954. Petitioner cannot insulate the estate from the acts and knowledge of the original personal representative. During the course of administering an estate, numerous personal representatives may succeed one another, but the collection of the revenue cannot be made subject to the identity of the particular fiduciary representing the estate. Moreover, estoppel against the government has been applied in other circumstances only in rare situations involving an unconscionable injury. See *Schuster* v. *Commissioner*, 312 F. 2d 311, 317 (9th Cir. 1962). Here, the estate has paid only one estate tax, and at most has been deprived of a windfall. Significantly, it seeks to profit not only from the Commissioner's apparent error in misplacing the original return, but also from the dereliction of duty of its initial personal representative in failing to make payment when due. In these circumstances, equitable estoppel is inappropriate.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

SEPTEMBER 1979

DOJ-1979-09